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IN THE

Supreme Court of the United States

OCTOBER TERM — 1970

70-124

No. ~~1581~~

RAYMOND ALFRED BEAUDINE,
Petitioner

v

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

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OCTOBER TERM, 1970

No. _____

RAYMOND ALFRED BEAUDINE,
Petitioner

v

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, RAYMOND ALFRED BEAUDINE, respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in this cause on February 5, 1971.

OPINION BELOW

The opinion of the Court of Appeals to be reviewed is not reported but is printed, with the judgment, in the appendix hereto. The order of the District Court, denying the motion to vacate sentence, which order was the subject of the appeal resulting in the opinion of February 5, 1971, is also printed in the appendix hereto.

The Petitioner's original conviction was appealed to the Court of Appeals and is reported at 414 F2d 397. The case was before the Court of Appeals on an earlier appeal and that opinion was reported at 368 F2d 417. Both opinions are printed in the appendix hereto.

JURISDICTION

A per curiam opinion of the Court of Appeals, and the judgment thereon, were entered February 5, 1971. No petition for rehearing was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. May a motion to vacate sentence under 28 U.S.C. § 2255 be denied in the District Court where no order to show cause was entered; no response by the government to the motion was required or filed; no evidentiary hearing was held; where the petitioner alleged in his motion that he was denied a speedy trial and the allegations of the motion were unrebutted that petitioner was indicted November 17, 1961, the first trial commenced May 4, 1965, the passage of time made his defense and proof more difficult, and that petitioner was handicapped and prejudiced in recalling incidents and in obtaining evidence to rebut prejudicial testimony offered against him?

2. May a motion to vacate sentence under 28 U.S.C. § 2255 be denied where the petitioner was convicted of an offense not charged in the indictment returned by the grand jury?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment, Constitution of the United States, provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy . . . trial . . . and to be informed of the nature and cause of the accusation; . . ."

The Fifth Amendment, Constitution of the United States, provides in pertinent part:

> "No person shall be held to answer for a . . . infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor be deprived of life, liberty, or property, without due process of law; . . ."

Section 2255, Title 28, United States Code, provides in pertinent part:

> "A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> A motion for such relief may be made at any time.
>
> Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and

make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or re-sentence him or grant a new trial or correct the sentence as may appear appropriate. . . ."

Section 1006, Title 18, United States Code, provides in pertinent part:

> "Whoever, being an officer, agent, or employee of or connected in any capacity with . . . any lending, mortgage, insurance, credit or savings and loan corporation or association authorized or acting under the laws of the United States . . . with intent to defraud the United States or any agency thereof, or any corporation, institution, or association referred to in this section, participates or shares in or receives directly or indirectly any money, profit, property, or benefits through any transaction, loan, commission, contract, or any other act of any such corporation . . . shall be fined . . . or imprisoned . . . , or both."

STATEMENT OF THE CASE

The Court of Appeals, by a per curiam opinion entered February 5, 1971, affirmed an order of the sentencing district court which denied, without an evidentiary hearing, petitioner's motion to vacate sentence, as amended, filed under the provisions of 28 U.S.C. §2255.

On June 29, 1970, Beaudine filed his motion to vacate sentence setting forth the following pertinent particulars:

> "1. Petitioner is presently serving a sentence for Five Years for violation of Title 18, United States Code, Section 1006, for allegedly participating and sharing in and receiving money from one Joseph M. Mulvey through transactions and loans of the Clearwater Federal Savings and Loan Association, while an officer of such Association, with intent to injure and defraud that Association and the Federal Savings and Loan Insurance Corporation. The sentence was imposed by the United States District Court for the Middle District of Florida on the 29th day of June, 1967. A copy of the judgment of that Court is attached to this Petition as Exhibit 1. Petitioner is presently confined to the Hillsborough County Jail but is to be transported to the Federal Prison Camp, Eglin Air Force Base, Florida, for the serving of his sentence.
>
> 2. The Conviction and sentence pursuant to which Petitioner is being detained, was imposed in violation of the Petitioner's rights under the Fifth and Sixth Amendments to the Constitution of the United States. The facts showing these constitutional violations are as follows:
>
> a. Denial of a speed (sic) trial.
>
> 1) The Petitioner was originally charged by an Indictment filed November 17, 1961 in the United States District Court for the Southern District of Florida, Tampa Division. A copy of such Indictment is attached to this Petition as Exhibit 2, being Case No. 7934 T. Cir.
>
> 2) On August 10, 1962, the case, then scheduled for trial on October 22, 1962, was removed from the trial docket pursuant to an Order by

Judge Joseph P. Lieb. A copy of such Order is attached hereto as Exhibit 3.

3) On November 30, 1962, the case was ordered removed to the Middle District of Florida for trial from the Southern District of Florida, and on December 4, 1962, the case was assigned to the Tampa Division of the Middle District of Florida. A copy of these orders is attached hereto as Exhibit 4.

4) On April 30, 1963, an Order for Dismissal was entered by the United States Attorney, upon obtaining leave of Court, upon the allegation that a superseding Indictment had been returned. A copy of such order is attached hereto as Exhibit 5.

. . .

6) Trial commenced before Judge Joseph P. Lieb on May 4, 1965, in the Middle District of Florida and a verdict of guilty was returned on May 6, 1965.

7) The Fifth Circuit Court of Appeals, by a decision rendered November 17, 1966, reversed the verdict of guilty, and the judgment and sentence entered thereon, and remanded the cause. This opinion is reported at 368 F2d 417.

8) The Petitioner was again placed on trial before Judge Clarence Allgood in February, 1967, which trial resulted in a mistrial because the jury was unable to agree upon a verdict.

9) Thereafter, Petitioner filed his Motion to Dismiss Indictment, attached hereto as Exhibit 7, which was denied by Judge Lieb.

10) The Petitioner was again placed on trial on June 5, 1967, which resulted in an acquittal upon two counts and a conviction of one count.

11) The Appeal to the Fifth Circuit Court of Appeals was affirmed on August 14, 1969, by a decision reported in 414 F2d 397.

12) Certiorari to the United States Supreme Court was denied.

13) Petitioner was denied one of the most basic rights preserved by our Constitution—a speedy trial. The passage of time made Petitioner's defense and proof more difficult. The fact at issue was Petitioner's intent and when a fact at issue is as subtle as a mental state, the difficulties of proof are immeasurably enhanced. In addition, Petitioner's stock of emotional and financial resources was drained and his capacity to defend himself was undermined. Finally, he was prejudiced by the delay when the prosecution at the last trial in 1967, which was beyond the statute of limitations for the offense allegedly committed in 1960, presented new testimony of witnesses Fogel, Plumlee, Ricard and Edwin and Ruth Byerly. These new witnesses presented evidence of discussions and conversations during the year 1960, which was prejudicial to the Petitioner. Due to the passage of almost six years from the date of the first Indictment, Petitioner was handicapped and prejudiced in recalling the incidents and in obtaining evidence to rebut or explain the testimony of these pre-Judicial (sic) witnesses."

"5) The Indictment returned against Petitioner failed to apprise Petitioner with reasonable certainty of the nature of the accusation against him. The Indictment alleged that Petitioner did have an intent to 'injure' the Clearwater Federal Savings and Loan Association. Although the word injure had a common and

well understood meaning of hurt or damage, the prosecution was allowed to obtain a conviction without any evidence of such intent. The Indictment, therefore, allowed the prosecution to shift its theory of criminality so as to take advantage of each passing vicissitude of the trials and appeal.

6) The Petitioner was denied the opportunity to testify directly concerning his intent at the trial of this cause, although the prosecution was permitted great leeway in presenting collateral testimony concerning the same issue." (A-1 thru 8).

Certain exhibits were attached as follows:

1. Judgment and Commitment (A-9)
2. Indictment (A-11-12)
3. Order of Removal from Docket (A-12)
4. Order of Removal to Middle District of Florida for Trial (A-13)
5. Order for Dismissal (A-15)
6. Indictment (A-16-20)
7. Motion to Dismiss Indictment (A-21-23)

A motion for leave to amend the motion to vacate was filed September 1, 1970, and granted, which added paragraph 7 to the motion, as follows:

" '7) The Petitioner was convicted of an offense not charged by the indictment returned in this cause in violation of the Fifth Amendment to the Constitution of the United States.' " (A-25)

The order denying the motion to vacate sentence was entered and filed September 9, 1970, and stated in its material part:

> "2. The motion to vacate sentence, as amended, is denied." (A-26)

The sentencing court heard argument of counsel on two occasions as to the necessity for an evidentiary hearing. The first occasion was July 23, 1970 (A-28-75). The second occasion was September 9, 1970, (A-76-106). In the interim, Beaudine filed a memorandum in support of his motion (A-25). The Court did not require a return to the motion, nor oral argument, nor a memorandum from the Government. No reasons were set forth in the written order although the Court did orally express his reasoning for the denial of the motion without a hearing. He said:

> "It just seems to me that for another hearing along the lines you've indicated is just to go over and plough the same ground twice and certainly there is an old saying in the law that litigation must come to an end at some time and it seems to me that (23) this is the time that it's probably at an end after six or seven or eight years in the Courts and to start over again de novo and go through an evidentiary hearing, I can't see how any useful purpose can be accomplished to plough the same ground twice and on the basis of the record before the Court, I can't see where any prejudice exists or where there has been any denial of your right to a speedy trial.
>
> And I'm saying all these things so that the Court of Appeals will have the benefit of it in the event that you decide to take an appeal as you have a perfect right to do, and as you know, from my denial of the motion to vacate the sentence, that is,

the motion as amended to vacate the sentence, and I'll enter an order accordingly in the next day or two." (A-94-95)

REASONS FOR GRANTING THE WRIT

1. The granting of the petition will give this Court the opportunity to clarify an accused's right to a speedy trial, which is an issue of consumating importance in the criminal courts of every jurisdiction in this nation, and to establish that a conviction obtained after a deprivation of this right is open to collateral attack under 28 U.S.C. §2255.

The importance of the Sixth Amendment right to a speedy trial has only recently been the subject of a case arising from the State of Florida. See *Dickey v Florida,* 398 U.S. 30, 90 S. Ct. 1564, 26 L.ed 2d 26.

The motion for post conviction relief filed by Beaudine was denied without an evidentiary hearing. No order to show cause was issued as a result of the motion to vacate sentence. The district court did not require any type of response by the government to the motion filed under the provisions of 28 U.S.C. §2255.

Beaudine's motion may have been denied without a hearing only if:

a) the motion and the files and records in the case conclusively show that the prisoner is entitled to no relief; (28 U.S.C. §2255);

b) the grounds for relief relied upon were previously determined, on the merits, adversely to Beaudine after an adequate hearing, and the ends of justice would not be served by reaching the merits of the new

motion, *Sanders v United States,* 373 U.S. 1, 83 S.Ct. 1068 (1963); *Kaufman v United States,* 394 U.S. 217, 89 S.Ct. 1068 (1969);

c) the Government can show that a successive application for relief constitutes an abuse of the remedy, and in such cases it rests with the Government to make the claim with clarity and particularity in its return to the order to show cause, *Sanders v United States,* supra; *Price v Johnston,* 334 U.S. 266, 68 S.Ct. 1049, 92 L.ed 1356;

d) or if Beaudine has deliberately bypassed ordinary procedures for review available to him. *Kaufman v United States,* supra. In this instance, this standard depends on the considered choice of Beaudine. A choice made by counsel not participated in by Beaudine does not automatically bar relief. Ordinarily, a hearing must be held to determine the facts relied upon to show a deliberate bypass as well as their legal sufficiency. *Fay v Noia,* 372 U.S. 391, 83 S.Ct. 822.

The sentencing Court's reasons for denying the motion are shrouded in mystery because of the lack of an expressed reason or findings and conclusions of law. See *Price v Johnston,* supra. None of the discretionary exceptions to the hearing requirement listed above appear to be applicable to this case.

The facts regarding the denial of the speedy trial were set forth in Beaudine's memorandum filed with the sentencing Court, and which was filed in its original form with the Court of Appeals. They are as follows:

a) Indictment: November 17, 1961 in case no. 7934.

b) Case set for trial for October 22, 1962.

c) Order of Judge Simpson ordering judges of the Southern District to remove cases from trial calendar in Tampa area which trials commence October 8, 1962, which will not be finally concluded by October 28, 1968: August 6, 1962.

d) Order of Judge Lieb removing case 7934-T from trial docket, to be reset for trial at a later date: August 10, 1962.

e) Trial set in 7934-T for April 15, 1963: March 13, 1963.

f) Indictment #7934-T dismissed by U. S. Attorney with leave of Court for the reason that a superseding indictment had been returned: April 30, 1963.

g) Indictment No. 63-79-T filed: April 24, 1963.

h) Trial set in 63-79-T for May 3, 1965: March 15, 1965.

i) Verdict returned: May 6, 1965.

j) Conviction reversed: November 17, 1966.

k) Trial set for February 20, 1967: December 1, 1966.

l) Jury unable to reach verdict: February 21, 1967.

m) Trial set for May 1, 1967.

n) Motion to dismiss indictment on grounds of exhaustion of physical and financial resources, harassment, and violation of due process because of delay of *six* years from date of original indictment: March 22, 1967.

o) Verdict: June 8, 1967.

In view of the fact that there is nothing very speedy about a trial occurring three and one-half years after indictment, Beaudine should have been granted an evidentiary hearing on this issue. See *Waugaman v. United States,* 5th Cir., 1964, 331 F.2d 189. Especially where the fact at issue at his trial was a mental state such as intent. *Williams v. United States,* D.C. Cir., 1957, 250 F.2d 19.

Since no order to show cause was entered and no response was filed by the government to the facts alleged in the motion, Beaudine's allegations should be accepted as true.

Beaudine alleged in his motion, which was uncontroverted by any response by the government, that the passage of time made his defense and proof more difficult; that his stock of emotional and financial resources was drained and his capacity to defend himself was undermined. Finally, he alleged that he was handicapped and prejudiced in recalling incidents and in obtaining evidence to rebut prejudicial testimony offered against him. This was not rebutted.

When a defendant has been denied his right to a speedy trial, the Court should dismiss the charge against him. *Smith v. Hooly,* 393 U.S. 374, 89 S.Ct. 575, 21 L.ed 2d 607. Beaudine did request a dismissal of the indictment by his motion of March 22, 1967, on the grounds of exhaustion of his physical and financial resources because of a delay of six years from date of indictment. These are some of the classical reasons why the Sixth Amendment right to a speedy trial was incorporated in our Constitution. See concurring opinion of Justice Brennan in *Dickey v. Florida,* supra.

The lack of a hearing deprived Beaudine of the opportunity to prove prejudice from the delay, which can be an important factor in some cases. *Hedgepeth v. United States,* D.C. Cir., 1966, 364 F.2d 684; and concurring opinion of Justice Brennan in *Dickey v. Florida,* supra.

If Beaudine's allegations are accepted as true, and they have not been controverted by any response by the government before the sentencing judge, then his conviction should be reversed and the indictment dismissed against him. At the very least, the matter should be remanded for a proper hearing with an order entered thereafter setting forth findings of fact and conclusions of law.

2. The granting of the petition will enable this Court to stress that the prosecution and the Courts may not change the charging parts of an indictment to suit their own notions of what it ought to have been or what the grand jury would probably have made it if their attention had been called to suggested changes.

In this case, Raymond Beaudine was found guilty only of Count Three of the indictment returned against him (p. 65 of record, 63-77 Cr.T). Count Three charged that he did receive money in excess of $2,500 from Joseph Mulvey on or about July 14, 1960, "*with intent to injure and defraud* the Federal Savings and Loan Insurance Corporation and Clearwater Federal Savings and Loan Association; in violation of Title 18, United States Code, Section 1006." (p. 2 of record, emphasis supplied).

The word "injure" is not necessarily the same as "defraud". "Injure" is used in designating an "injury",

which has a common and well understood meaning of hurt, loss or damage. See *United States v. Lee,* Cir. Ct. N.D.N.Y. (1882) 12 FS 16, 819; *In Re City of Pittsburgh,* 90 A329, 243 Pa. 392. Although the grand jury, by indictment, asserted that the charge required proof of intent to *injure* and defraud, the conviction was obtained without any proof of such intent to injure. The Court of Appeals held that there was no such proof in the first appeal, *Beaudine v. United States,* 368 F.2d 417, 420. The record on the second appeal, from the conviction on Count Three, is in substantially the same position as on the first appeal regarding this issue. *Beaudine v. United States,* 414 F.2d 397, 399.

Thus, the conviction was of an offense not charged in the indictment. The Court of Appeals, in construing the *statute* held that it prohibited a typical conflict of interest and that the *statute* did not require proof of loss, or for that matter, proof of a purpose to bring about a loss to the Association or to the Government. The *indictment,* however, did require such proof in order to convict, we submit, when the grand jury inserted that Beaudine had an intent to injure as well as to defraud the Association and the Government.

The prosecution and the courts in this case have changed the charging parts of the indictment to suit their own notions of what it ought to have been, or what the grand jury would probably have made it if their attention had been called to suggested changes. This is improper and violates the Fifth Amendment, as quoted above. See *Exparte Bain,* 121 U.S. 1, 10, 30 L.ed. 849, 852, 7 S.Ct. 781; *Stirone v. United States,* 361 U.S. 212, 4 L.ed. 2d 252, 80 S.Ct. 270; *Russell v. United States,* 369 U.S. 749, 770-771, 8 L.ed. 2d 249, 254, 255, 82 S.Ct. 1038.

The charge in the indictment must specify the elements of the offense intended to be charged and apprise the defendant of the case that he must be prepared to meet. See *Amendment VI, U. S. Constitution.* Neither the Government nor the Courts are entitled to enlarge the indictment by revamping the whole theory of the prosecution and making new and additional charges against the defendant. Any other doctrine would place the rights of the citizen at the mercy or control of the Court or the prosecuting attorney. *Ex-parte Bain,* 121 U.S. at 13, 30 L.ed. at 853.

Raymond Beaudine has been convicted upon a charge which had not been returned by the grand jury. As stated in *United States v. Swarthout,* 420 F.2d 831, at 833, 6th Cir., 1970:

> "Under our system of justice it is not enough that evidence in a criminal case might support a finding of unethical conduct or of some violation of some law. It is essential that there be evidence from which a jury could have found the defendant guilty beyond reasonable doubt *of the particular offense* . . .with which defendant has been charged." (Emphasis supplied)

The grand jury in Raymond Beaudine's case may well have *not* indicted him if the requirement of proof of intent to injure had not been included in the indictment. It had that right, even though the statute may not have required that element to convict defendant of violating the statute. See *United States v. Cox,* 5th Cir., 342 F.2d 167, at 190 (1965).

If the prosecution did not wish to proceed under the elements and burden of proof imposed upon them by the indictment, the United States attorney could have

declined to sign the indictment. The prosecution could have waited until a new grand jury convened and then again presented their evidence to see if the new grand jury would indict without requiring proof of intent to injure to secure a conviction. The prosecution, however, could not *amend* the indictment by deleting the intent to injure element. By the indictment upon which the prosecution went to trial, they were committed to prove Beaudine's receipt of money from Mulvey with intent to "injure" the Association and the Government. By the holdings of the Fifth Circuit, in both Beaudine appeals, they failed in that proof.

CONCLUSION

For all of the reasons advanced, and in the interest of justice, the Petition should be granted.

Respectfully submitted,

RAYMOND E. LAPORTE

RAGANO & LaPORTE
408 Madison Street
Tampa, Florida 33602
Attorney for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petition for Writ of Certiorari has been furnished by mail to the Honorable John L. Briggs, United States Attorney, P. O. Box 59, Jacksonville, Florida 32201, on this the ____ day of April, 1971

RAYMOND E. LAPORTE

APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA TAMPA DIVISION

NO. 70-268-Civ-T

RAYMOND ALFRED BEAUDINE,
Petitioner,

v.

UNITED STATES OF AMERICA
Respondent.

ORDER

ORDERED:

1. The motion, filed herein September 1, 1970, for leave to amend the motion to vacate sentence, previously filed, to include sub-paragraph 7 in paragraph 2b to read as follows:

> "7 The Petitioner was convicted of an offense not charged by the indictment returned in this cause in violation of the Fifth Amendment to the Constitution of the United States",

is granted.

2. The motion to vacate sentence, as amended, is denied.

DONE AND ORDERED at Jacksonville, Florida, this 9th day of September, 1970.

Original signed:
CHARLES R. SCOTT
Judge

CC Raymond E. LaPorte, Esquire
United States Attorney (Hatchett)

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 30771
Summary Calendar*

RAYMOND ALFRED BEAUDINE,
Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,
Respondent-Appellee.

Appeal from the United States District Court for the Middle District of Florida

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(February 5, 1971)

Before WISDOM, COLEMAN, and SIMPSON, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

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*Rule 18, 5 Cir.; Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al., 5 Cir. 1970, 431 F.2d 409, Part I.

[1]See N.L.R.B. v. Amalgamated Clothing Workers of America, 5 Cir. 1970, 430 F.2d 966.

APPENDIX C

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
OCTOBER TERM, 1970

No. 30771
Summary Calendar

D. C. Docket No. 70-268-Civ-T

RAYMOND ALFRED BEAUDINE,
Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,
Respondent-Appellee.

Appeal from the United States District Court for the Middle District of Florida.

Before WISDOM, COLEMAN, and SIMPSON, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was taken under submission by the Court upon the record and briefs on file, pursuant to rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that petitioner-appellant pay to respondent-appellee, the costs on appeal to be taxed by the Clerk of this Court.

February 5, 1971

Issued As Mandate: Mar. 1, 1971

APPENDIX D

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 25019

RAYMOND ALFRED BEAUDINE,
Appellant,

versus

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Middle District of Florida

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(August 14, 1969)

Before GOLDBERG, GODBOLD and SIMPSON, Circuit Judges.

SIMPSON, Circuit Judge: This case is before us for the second time. Appellant was originally indicted in 1963, when a five-count indictment charged him, as an officer of Clearwater Federal Savings and Loan Association, and Joseph Merrill Mulvey with violating Title 18, U.S.C., §1006 and Title 18, U.S.C., §371 in that appellant took kickbacks from Mulvey, a contractor performing work for borrowers under Title I, Home Improvement Loan, and conspired to commit offenses

against the United States. Counts One and Three of the indictment charged that appellant, with intent to injure and defraud Clearwater Federal Savings and Loan Association and the Federal Savings and Loan Insurance Corporation, shared in and received benefits from Mulvey through transactions of loans of the association. Counts Two and Four charged Mulvey with aiding and abetting appellant to commit the offenses charged against him in Counts One and Three. The fifth count of the indictment charged appellant and Mulvey with conspiracy. At the first trial of this case in 1963 the counts against Mulvey were dismissed on the basis of double jeopardy. A jury then returned a verdict of guilty against Beaudine as to the three remaining counts of the indictment, and he was sentenced to five years' imprisonment on each of these counts, the sentences to run concurrently. On appeal from that conviction this Court reversed on the ground that restrictive cross-examination of Mulvey, along with other restrictive evidentiary rulings, could not be regarded as harmless error. *Beaudine v. United States,* 5 Cir. 1966, 368 F.2d 417. On remand and retrial, appellant was acquitted by a jury as to Count one and Count Five, but was found guilty as to Count Three, and was sentenced to five years' imprisonment. The present appeal followed.

As this Court said on the previous appeal in this case, Title 18, U.S.C., §1006, "makes it an offense for an officer, agent, or employee of a savings and loan association to participate or share in or receive directly or indirectly any money profit, property, or benefits through any transaction, loan, commission, contract, or any other act of such association if done 'with intent to defraud the United States or any agency thereof.'" *United States v. Beaudine,* 5 Cir. 1966, 368 F.2d 417, 419. On this appeal Beaudine contends that the mental element of the crime was not proven by sufficient evidence and that various rulings of the trial court concerning testimony and other evidence denied him a fair trial. We find these contentions to be without substance and affirm.

The factual background culminating in this indictment may, as was said in the earlier case, 368 F.2d at 419, "be quickly told". In May of 1959 appellant was employed by the Clearwater Federal Savings and Loan Association to manage its home improvements loan department with the title Home Improvement Loan Officer. He was to develop home improvement loans. He established the department, and received and considered applications and closed loans with full authority to approve or disapprove home improvement loans. His employer did not set forth any rules or regulations guiding him in his duties. The FHA regulations on home improvement loans were broad, and under them the association and its loan officers could rely upon the statements contained in a customer's application for a home improvement loan. Appellant instituted a policy of obtaining a credit report on each applicant, and required the applicant to agree not to encumber the property.

The heart of the government's case was that Mulvey and Beaudine entered into an agreement as the result of which Beaudine, as an officer of the federal savings and loan association, participated in receiving money from Mulvey through loans at the Clearwater Federal Savings and Loan Association. Mulvey testified that appellant had asked him if he would like to have a partner, with appellant receiving half of the profit Mulvey made on home improvement loans. Mulvey testified that between July and September of 1960 he paid Beaudine between sixteen and eighteen thousand dollars as his portion of profits on jobs that his construction company had financed through appellant at Clearwater Federal Savings and Loan Association.

Appellant's first argument is that there was insufficient evidence of the "intent to defraud" required by the statute. Appellant says, as he did on the prior appeal. "The testimony (accepting the truthfulness for the purposes of argument) of Mulvey, showed an agreement whereby Mulvey and the appellant would divide the profits that Mulvey would make on home improve-

ment work that Mulvey's company would undertake on loans secured through Clearwater Federal Savings and Loan Association". Appellant argues, however, that the agreement not only did not show any intent to injure or defraud Clearwater Federal Savings and Loan Association, but on the contrary showed that appellant would give Mulvey a few jobs if Mulvey would straighten out the credit or get them in such a position that the loan would be all right.

This Court in *Beaudine v. United States,* 368 F.2d at 420, carefully examined and analyzed the statute under which Beaudine was convicted. It was pointed out that the statute embraces a typical conflict of interests prohibition, and that when there is a purpose to deceive by one who ostensibly acts solely for his principal while he knows he has a pecuniary interest that will or may subvert his undivided loyalty, the fraudulent purpose is completed whether the objective is to obtain an advantage or to cause the principal to suffer a loss. The evidence amply supports the jury verdict on Count There. (sic) Indeed, appellant concedes that the record is in substantially the same position as on the first appeal and that the point as to his intent is controlled by this Court's decision in the earlier case. That decision was reached after a careful review of the statutory requirements. It is the law of this case, and no "cogent reason" — either a change in controlling law or any other — is suggested for departure from it.[1]

The chief contentions of appellant relate to the conduct of the trial, and he raises four points in regard to which he claims the trial court erred so as to deny him a fair trial. It is urged that the trial court erred (1) in the denial of an opportunity to testify as to his

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[1] *Lumbermens Mutual Casualty Co. v. Wright,* 5 Cir. 1963, 322 F.2d 759 at 763; cert. denied 354 U.S. 939, 77 S.Ct. 1397, 1 L.Ed.2d 1536; *Lincoln National Life Insurance Co. v. Roosth,* 5 Cir. 1962, 306 F.2d 110; *Green v. American Tobacco Co.,* 5 Cir. 1968, 391 F.2d 97 (dissenting opinion at page 106, 113, adopted as Court's opinion en banc, 5 Cir. 1969, 409 F.2d 1166).

intent when he accepted money from Mulvey, (2) in the allowance into evidence of transactions outside the scope of the indictment, (3) in the government's failure to produce upon request records that would have aided appellant in the cross-examination of Mulvey, and (4) in the manner in which Jencks Act statements were furnished to him. These contentions will be considered in order.

Beaudine was asked the following question by his counsel:

> "Have you ever during your association with the Clearwater Federal Savings & Loan Association done any act with the intent to injure and defraud that Association?"

The government objected to the form of the question, and contended that its terminology was in words of legal art. The objection was sustained by the trial court, and appellant contends that this action amounted to a deprivation of his right to testify as to his intent in accepting money from Mulvey. This contention is without merit. The question was extremely broad in form, and appellant did not seek to rephrase it. The mental element of this crime was specifically described on the former appeal, where this Court pointed out that if there was a purpose to deceive, it did not matter whether the objective was to obtain an advantage or to cause the principal to suffer a loss — either objective completed the fraudulent purpose. 368 F.2d at 420. Appellant had full opportunity to testify as to his mental state. In response to questions put by his counsel, he testified that he had never approved any loan applications for Clearwater Federal Savings & Loan Association that he felt were harmful to the association or improper in any fashion. He testified that he had never been in partnership with Mulvey, directly or indirectly, that he had never received any kickbacks from Mulvey directly or indirectly, and that he had never offered to make an illegal or bad loan to anyone. The jury was

fully and properly instructed as to the mental element of this crime, and appellant was not denied his right to testify as to his intent.

Appellant next urges that the trial court erred in permitting witnesses to testify as to transactions not specified in the indictment itself. This contention is lacking in substance. On the previous appeal Judge Brown pointed out that "Broad range was rightfully allowed to the government in establishing the general scheme, pattern, procedure, motivation and practice out of which to establish the requisite intent to defraud and participation in profits". 368 F.2d at 425. The trial judge had in mind and specifically referred to the language in the prior opinion dealing with the proof of intent, and ruled in accordance with that holding in admitting the complained of testimony. Further, it should be kept in mind that Count Five, the conspiracy count was before the jury, although the jury later found Beaudine not guilty under that count. The other transactions were properly for the jury's consideration as circumstances probative of conspiracy. No error is made to appear in this regard.

It is further contended by Beaudine that he was denied a fair trial because the government was not ordered to produce a "rap sheet" or an F.B.I. record for appellant's use in cross-examining the witness Mulvey. Of course Mulvey was the crucial witness against Beaudine, and it was therefore highly important that the appellant have full opportunity to discredit him if possible. This was the crux of our reversal upon the former appeal.

An examination of the entire testimony and the transactions concerning Mulvey's prior record make it clear, however, that appellant was not denied a fair trial in this respect. On direct examination Mulvey testified that he had been convicted of a felony four times — in 1934, 1936, 1948 and 1960. These offenses included breaking and entering, theft of an automobile, and de-

frauding the government in connection with FHA loans. On cross-examination Mulvey was asked whether it was not a fact that he had been convicted not of four, but of seven different felonies. He denied the suggestion. At appellants request there was then a sidebar conference at which appellants attorney stated that he believed Mulvey had been convicted of seven different felonies and asked the court to order government counsel to produce a rap sheet or F.B.I. record to impeach the witness. This motion was denied, the trial court in effect saying that it was up to appellant to try to prove that the witness had been convicted of three other felonies. Subsequently, a subpoena duces tecum was served on a special agent of the F.B.I. who had been with government attorneys throughout the trial at counsel table. After a hearing the court then ordered the government to produce the rap sheet for the court's inspection in camera and then ordered the government to turn it over to counsel for appellant. Mulvey was subsequently cross-examined by counsel for the appellant with the rap sheet in counsel's possession. On this cross-examination appellant's counsel elicited from Mulvey testimony that indicated that he had been convicted of serious crimes more frequently than he had admitted when he was on direct examination. Some of this testimony could be construed, however, to show that Mulvey on direct examination was not necessarily lying deliberately, but may have been confused as to a distinction between a misdemeanor and a felony, concurrent sentences, and crimes committed while he was incarcerated. The testimony in its entirety shows clearly that appellant had and took advantage of a full opportunity to present to the jury the character, background and veracity of the witness Mulvey. Although appellant received some of the information that enabled him to cross-examine more vigorously at a later time than he would have preferred, his cross-examination was complete before the government rested its case. This point obviously is devoid of merit.

Appellant's final contention presents the most serious problem for our consideration. He urges that he was denied a fair trial because statements he was entitled to receive from the government under the Jencks Act, Title 18, U.S.C., §3500, were furnished to his counsel in the presence of the jury, and this in spite of a request that the jury be absent when they were supplied to him. The procedure followed by the trial court was to have the government furnish appellant's counsel with a witness' prior statements when the witness came to the stand, and to call a recess for the purpose of allowing appellant's counsel to examine the statement before beginning his cross-examination of that witness. The trial court carefully informed the jury that this procedure would be followed. Appellant's contention is that he was thereby placed in an untenable position in the eyes of the jury, in that a subsequent failure on his part to cross-examine or to offer evidence revealed by the statement would in the mind of the jury elevate the prior statements to the status of corroboration of the witness' testimony by a previous consistent statement.

There is substance in this contention, and support for it in some decisions. In *Gregory v. United States,* D.C. Cir. 1966, 369 F.2d 185, the Court of Appeals for the District of Columbia found it was improper for the trial court to require defense counsel to request, receive, and read Jencks Act statements in the presence of the jury. The Court there relied upon its earlier decision in *Johnson v. United States,* D.C. Cir. 1965, 347 F.2d 803, where the Court referred to the well-known rule of evidence that prior consistent statements may not be used to support one's own unimpeached witness. It was pointed out in the *Johnson* case that the Jencks Act did not abrogate this time-honored common law evidence rule. It was said that in order to avoid undue prejudice which might arise if the jury knew that Jencks Act statements were available to the accused, motions for their production should be made out of the hearing of the jury and the handing over of the statements should take place with the jury absent or at least unaware. In

that case the statements were turned over to defense counsel in the presence of the jury and then a recess was called to permit counsel to study the statements. That seems to have been the practice followed in the trial below. In *Gregory* the trial judge had shown familiarity with the *Johnson* case but declined to follow the procedure suggested by it because he thought the statements there were dictum. On appeal, the Court in *Gregory* said that its purpose in *Johnson* had been to preclude the jury "from drawing an inference that the statement or statements received are consistent with the witness' testimony unless defense counsel uses the statements to cross-examine him". The Court there said it could not perceive any reason other than to prejudice the exercise of Jencks Act rights to require defense counsel to request and receive such statements in the presence of the jury.

Permitting the jury to be present when Jencks Act material was being marked for identification was indirectly criticized in *United States v. Kahn,* 2 Cir. 1966, 366 F.2d 259, 265, cert. den. 385 U.S. 948, rehearing den. 385 U.S. 984, where the Court pointed out that it would have perhaps been better if the identification had been done in the absence of the jury. The Court said that the procedure followed there was not by itself sufficient grounds for reversal.

The suggestion in the *Kahn* case was supplemented by the Court of Appeals for the Second Circuit in *United States v. Gardin,* 2 Cir. 1967, 382 F.2d 601, 605, where the Court said:

> "The procedure to be followed should be left to the discretion of the trial judge. While we therefore lay down no hard and fast rule, we do suggest the following which generally may meet the positions of both parties. After the completion of the witness' direct testimony and before cross-examination has been concluded, the defendant will state that he requests leave

> to make a motion in the absence of the jury; the trial judge will then excuse the jury, and, in its absence, the defendant will move for disclosure of Jencks Act material."

Judge Moore concurred specially in the *Gardin* case because he thought the suggestion made by the majority of the Court there was for all practical purposes a direction, and he felt that a greater amount of discretion should be left to the trial judge in light of the circumtances that arose at a trial.

The rule of *Gregory* established for the District of Columbia and the rule of *Gardin* for the Second Circuit were recently appraised by the Seventh Circuit in *United States v. Nielsen,* 7 Cir. 1968, 392 F.2d 849, 853, 854. The Seventh Circuit in the *Nielsen* case felt itself incapable of envisioning every situation that might arise concerning the production of Jencks Act statements, and therefore declined to establish an inflexible rule leaving it instead to the sound discretion of the trial judge. In that case, for example, the Court affirmed a conviction because it found no prejudice resulting in view of defendant's counsel's vigorous cross-examination after he had received the Jencks Act statements. Defense counsel had requested to be heard out of the presence of the jury and had objected to the manner of tendering the statements. In *United States v. Stahl,* 7 Cir. 1968, 393 F.2d 101, 105, the Court quoted with apparent approval from *Gregory v. United States,* and referred to the procedure as unfair. The Court also said that the trial court's comment that the Jencks Act statement was being furnished to see if the witness was telling the same story on the stand as she told the F.B.I. when they took her statement, may serve to compound the error. In that case, however, no objection was made, the statements were used in cross-examination, and the incident was found to afford no basis for reversal.

Pallotta v. United States, 1 Cir. 1968, 404 F.2d 1035, is a recent and well-reasoned opinion which considers and evaluates the positions adopted by different Circuits and shows that prejudice may result both to the defense and to the prosecution in the implementation of the right of examination of pre-trial statements of government witnesses. We quote with approval and adopt for this Circuit the holding of that case. In our judgment it gives appropriate consideration to the rights of both parties:

> "We are unwilling to promulgate a hard and fast rule. Undoubtedly in some cases Jencks Act statements should be produced and studied in the physical absence of the jury. This would be particularly true where a witness' testimony is lengthy and complicated, or is especially crucial in the context of a given trial. On the other hand, there will be many cases where it will be sufficient to produce the statements out of the hearing of the jury and to call a recess without excusing the jury from the courtroom. Thus, when defense counsel desires production of Jencks Act statements, he should be allowed to make such a request before the bench out of the hearing of the jury. If defense counsel so requests, the court can determine at that time whether it is necessary to remove the jury from the courtroom. If the statements are used in cross-examination, the jury should be informed of the source of the questions and the statutory authority governing the use of such statements. These procedures should be followed in this circuit in trials commencing after the date of publication of the opinion in this case."

In the instant case it is noteworthy that the appellant's counsel requested in the presence of the jury that the Jencks Act statement of one witness be fur-

nished, and asked that they be given in advance because "it would save a lot of time". As indicated above the rule we adopt leaves room for discretion to be exercised by the trial judge in the circumstances as they actually develop at the trial. This discretion is not here shown to have been abused and we are not persuaded that Beaudine suffered any prejudice from the procedure followed. His conviction will not be reversed on this ground.

The judgment of the district court is

AFFIRMED.

APPENDIX E

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 22802

RAYMOND ALFRED BEAUDINE,
Appellant,

versus

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Middle District of Florida

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(November 17, 1966.)

Before BROWN, GEWIN and GOLDBERG, Circuit Judges

BROWN, Circuit Judge: The Appellant, Beaudine, an officer of Clearwater Federal Savings and Loan Association, was convicted for taking kickbacks from a contractor performing work for borrowers under Title I, Home Improvement Loan, in violation of 18 USCA §1006. Beside the attack upon the sufficiency of the evidence which we find unavailing once the standard of "defrauding' is fixed, his complaint is directed primarily to the undue restriction of cross examination of the contractor, an admitted ex-convict, and one who had

participated in like ventures before. We conclude that standing alone none of the instances of restrictive cross examination would call for reversal. But when considered together and in the light of other restrictive evidentiary rulings, we are left with such uncertainty that we cannot pass them off as harmless error. We therefore reverse and remand for new trial.

The story may be quickly told. Beaudine shortly after coming with Clearwater[1] was promoted to Assistant Vice President and put in charge of Title I, Home Improvement Loans. Under the regulations, 24 C.F.R. §201.6f, the lending association was afforded wide latitude in relying on the application for loan executed by the prospective borrower. Beaudine, however, establishing standards for Clearwater required a credit inquiry and report from the local Credit Bureau. Occasionally the Credit Bureau report would reflect outstanding debts of the applicant, frequently small in amount but old in age, such as doctors, hospital bills, etc., which would adversely affect the current credit rating of such person. Under the arrangement with Mulvey, the contractor, Beaudine would advise Mulvey of such situations. Mulvey was to advance the funds through the Credit Bureau acting as a collecting agency to pay off such adverse items. Mulvey would then "sell" the loan applicant on giving the improvement contract to his company. For this Mulvey agreed to split the contracting profits on each of such jobs on a 50/50 basis with Beaudine. In the period of three to six months there were approximately 70 such contracts which netted approximately $12,000 to $16,000 to Beaudine. All of the payments by Mulvey or his representatives to Beaudine were in cash and delivered furtively in a clandestine manner.

It rounds out this brief picture to state that the Government did not prove, nor even undertake to prove, that Clearwater suffered any loss or likely would suffer

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[1] Clearwater Federal Savings and Loan Association.

a loss from any of the Beaudine-Mulvey transactions. Indeed, to the contrary, the evidence showed that Beaudine had rejected not less than 90 credit applications presumably because of intrinsic deficiencies so these never got into the Beaudine-Mulvey profit-sharing arrangement.

The statute, an amalgam by the 1948 Code revisers of 11 or more similar acts respecting a like number of executive departments or governmental agencies, makes it an offense for an officer, agent, or employee of any savings and loan association to participate or share in or receive directly or indirectly any money, profit, property or benefits through any transaction, loan, commission, contract, or any other act of such association if done "with intent to defraud the United States or any agency thereof." 18 USCA §1006.[2] See *United States v. Meyer,* 5 Cir., 1959, 266 F.2d 747, 755, cert. denied, 361 U.S. 875, 80 S.Ct. 138, 4 L.Ed.2d 113.

If loss to the Association (or the Government) is required or for that matter the purpose to bring about a loss to the Association (or the Government), then this record is inadequate to make out an offense and the motion for a judgment of acquittal ought to have been granted. We agree, however, with the Government that the statute, awkwardly expressed as perhaps it is, is to be given no such narrow reading. Indeed, that it is a composite to cover many agencies and many activities is paralleled by the breadth of the specific actions prohibited which reveal clearly a congressional purpose to

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[2] "Whoever, being an officer, agent, or employee of or connected in any capacity with * * * any lending, mortgage, insurance, credit or savings and loan corporation or association authorized or acting under the laws of the United States * * * with intent to defraud the United States or any agency thereof, or any corporation, institution, or association referred to in this section, participates or shares in or receives directly or indirectly any money, profit, property, or benefits through any transaction, loan, commission, contract, or any other act of any such corporation * * * or association, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

keep that part of the market place in which the Federal Government plays such a significant role free from fraud, deception, and corruption. Thus it prohibits actions by officers and employees which, "with intent to defraud," will "deceive any officer, auditor, examiner or agent," and forbids the making of "any false entry in any book, report or statement * * *" or without proper authorization the drawing of "any order or bill of exchange" or the issuance of "* * * any note, debenture, bond or other obligation * * *." 18 USCA §1006.

The statute is intended to do much more than forbid unsophisticated embezzlement, larceny or theft. And that part of the statute with which we are concerned is a typical conflict of interests prohibition. As such it is a congressional recognition of the principle so well grounded in morality and equity that the servant cannot serve two masters and that when this is done without complete disclosure, the law considers that the master-principal's interests either will, or are apt to, suffer.[3] Approached in this light, the charge given by the trial Court, adapted from Judge Mathis' Manual of Jury Instructions, seems quite in order.[4]

The fraud commences with the deceit—ostensibly acting solely for the interest of the principal while all the while the faithless servant knows he, too, has a pecuniary interest which will or might subvert his un-

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[3] See Nye v. Lovelace, 5 Cir., 1956, 228 F.2d 599 at 603 and cases cited note 6. See especially Restatement of Agency §381, comment (a),(d); §387, comment (b).

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[4] "You will note that the acts charged in the indictment-information are alleged to have been done with 'intent to defraud'. However the evidence need not show that the United States or anyone was actually defrauded, but only that the accused acted with the 'intent to defraud'.

"To act with 'intent to defraud' means to act knowingly and with the specific intent to deceive or cheat, for the purpose of either causing some financial loss to another, or bringing about some financial gain to one's self." Mathis, Jury Instructions and Forms for Federal Criminal Cases, 27 F.R.D. 90, §7.05.

divided loyalty. When there is the purpose to deceive, it matters not whether the objective is to obtain an advantage or to cause the principal to suffer a loss. Either in effect completed the fraudulent purpose. See also *Baiocchi v. United States,* 5 Cir., 1964, 333 F.2d 32, 35-36; *United States v. Corbett,* 1909, 215 U.S. 233, 244-45, 30 S.Ct. 81, 54 L.Ed. 173; *cf. United States v. Spector,* 7 Cir., 1963, 326 F.2d 345, 349; *United States v. Meyer,* 5 Cir. 1959, 266 F.2d 747, 754-55; *Gevinson v. United States,* 5 Cir., 1966, 358 F.2d 761.

Here, of course, once Mulvey's story was credited, Beaudine (a) practiced deceit and (b) stood to, and did, gain extensively. Under that standard, the evidence was therefore sufficient to sustain conviction. But the whole case, both from the standpoint of its legal sufficiency and from the probative persuasiveness for jury resolution, rested on Mulvey. He was a confessed three or four-time convicted felon. His credibility both from the standpoint of moral trustworthiness and recollection was therefore of critical, decisive importance. But at least twice, under objections made by Government counsel so frequently throughout the whole record as to almost defy the orderly development of any particular fact or thread, the trial Court severely restricted cross examination. After Mulvey had earlier testified in cross examination that he had been convicted "three or four times" for felonies, the last of which was "for fraud against the FHA" in 1960 in that very Court, Government counsel again objected to further inquiry on a ground which turns out to have been a misapprehension of the law.[5] The Court agreed.[6] Again, at the very close

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[5] Government counsel: "I object, * * *. The man [Mulvey] has stated that he has been convicted of a felony three or four times, and that is as far as we can go."

[6] The Court: "I think that is as far as * * *

"I don't think the nature of the case involved has anything to do with it * * *. So I don't think the jury should pay any attention to that. What he is entitled to ask is the fact that the man has been convicted of a crime. We are not trying him for the crime."

of cross examination, counsel's efforts to find out what crimes Mulvey had been convicted of, when and where, were similarly rebuffed by Government counsel's objections sustained by the Court.[7]

We have no doubt that to cut off inquiry in this fashion was erroneous. The one attacking credibility was entitled, at least in the first instance, to establish the number of convictions, the nature of each of the crimes charged, the date and time of conviction. Refusal to allow this minimum information to be developed could not be sustained by the accepted and salutary principle which prohibits the attacker going into the details of the crimes.[8] Moreover, the subject of inquiry being relevant, the purpose of the proposed questioning was something more than merely to establish the fact that he had some prior felony convictions. Here it took the form of a classic inquiry designed to test memory which, in many, many details, was hazy at best. Added to that is the fact that the law does not limit inquiry to whether there was a "felony" conviction. The nature of the crime is a relevant fact for the reason, if no other,

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[7] "Q. Now. you stated that you were convicted three or four times. You are not certain of how many times you have been convicted of a felony?

"A. No, sir. Some of them are back forty years ago when I was in my teens.

"Q. And when was the last time you were convicted?

Government Counsel: "He has been over that, Judge.

The Court: "That is not necessary. Now you have got all that you are going to get on that. Going into those offenses is not necessary and we will have no more of this. The question of how many times he has been convicted of a crime has been gone into thoroughly."

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[8] "How far may the cross-examiner go in his inquiries about convictions? He may ask about the name of the crime committed, as murder or embezzlement, and the punishment awarded * * *. On the whole, however, the more reasonable practice, minimizing prejudice and distraction from the issues, is the one generally prevailing that beyond the name of the crime, the time and place of conviction, and the punishment, further details such as the name of the victim and the aggravating circumstances may not be inquired into." McCormick, Evidence §43, at 92-93 (1954).

that it is rightfully assumed that some types of crimes have a more immediate direct bearing than others on the element of veracity.[9] Of course proof of this vital fact can hardly be made if the inquiry is cut off when the witness admits three or four felony convictions.

Beaudine complains also of restrictive cross examination into the incident of Mulvey's request of Beaudine's counsel that he be paid $500 and following the failure to do so, Mulvey's refusal to give a statement. Apparently at the time of an earlier trial of Beaudine on other charges a couple of years before, Mulvey had been transferred from the Federal Penitentiary to the Tampa City Jail to be available as a witness. About this time Mulvey along with Beaudine had been indicted on May 10, 1963 under the instant indictment for the Clearwater kickbacks. According to Mulvey, he arranged through his counsel to have an associate of Beaudine's counsel (Gonzalez) see him (Mulvey) in the jail.[10] According to Mulvey, he asked if Beaudine would pay his attorney's fees. In a few days associate counsel Gonzalez asked Mulvey where the money was to be sent. In the

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[9] Indeed, see the Model Code of Evidence which would limit the use of felony convictions.

"Rule 106. Evidence Affecting Credibility.

"(1) [F]or the purpose of impairing or supporting the credibility of a witness, any party including the party calling him may examine him and introduce extrinsic evidence concerning any conduct by him and any other matter relevant upon the issue of his credibility as a witness * * * except that extrinsic evidence shall be inadmissible * * *

"(b) of his conviction of crime not involving dishonesty or false statement * * *."

Model Code of Evidence rule 106 (1942). This is in conformity with the Uniform Rules of Evidence, Rule 21. See McCormick, Evidence §43, at 91 n.12 (1954). See generally Morgan, Basic Problems of Evidence 74 (1962).

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[10] There is a strong suggestion that the May 10, 1963, indictment against Mulvey was an outgrowth of his refusal to testify against Beaudine in the earlier 1963 trial. Whether this was from loyalty to Beaudine, fear of self-incrimination, or both was not explored.

meantime Mulvey's counsel successfully urged a plea of double jeopardy to the present indictment after which he was returned to the Atlanta Penitentiary. Subsequently, as Mulvey puts it, "When I got out," presumably from the Penitentiary, he found "the $500 had not been paid." Making inquiry of Gonzalez, Gonzalez informed Mulvey that he was no longer associated with Beaudine's counsel and could take no action. Whereupon Mulvey went to Mr. Ragano, one of Beaudine's present counsel who disclaimed knowledge about the agreement to pay $500. At the same time Ragano asked Mulvey if he would care to make a statement and Mulvey declined.[11]

To counsel's question to Mulvey that "You requested 500 and it was not paid; is that right?," Government counsel again interposed an objection that "I think that is in the evidence now." As though cross examination was satisfied with the first answer, the Court responded, "That is all right. Don't spend any more time on this." And then the Judge, not allowing further inquiry, unavoidably, although obviously not intentionally, bolstered Mulveys credibility by stating, "That is the right answer, isn't it Mr. Mulvey?" to which the witness replied, "Yes, sir." Making one more pass at the subject, counsel's inquiry within the next few moments concerning the $500 met with another objection that "This is just cumulative" and a like admonition from the Judge that "we are not going to spend much more time on it."

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[11] In the preliminary questioning leading up to the conversation and demand, Mulvey, obviously, an experienced witness, fenced with counsel and turning to the court asked if he could tell the story just "like it was." His narrative ended this way:

"So I went to another attorney, and they got me a meeting with Mr. Ragano. [Beaudine's counsel] And Mr. Ragano says, 'I don't know nothing about the 500.' He says, 'Would you care to make a statement for me?' And I said, 'No, sir, I don't care to make no statement.' And that was the end of the conversation on the 500. And that there is the whole deal of the 500."

Obviously this incident was of vital importance in assaying the credibility of Mulvey. If, as his self-generated narration reflected, it was simply the case of his asking for $500 for counsel fees since his predicament had been brought about by his loyalty to Beaudine and an unconnected unwillingness to give a statement, it was one thing. On the other hand, if, as the incident certainly at least suggested, it was a case of Mulvey being willing to talk for a price, the price being $500 and an unwillingness to testify on refusal to pay, it was quite a different thing. Of course as every experienced trial lawyer knows, it would have been a TV courtroom drama dream to expect Mulvey to confess in so many words that it was the latter. This could only be demonstrated to the satisfaction of the jury by an adroit, penetrating, relentless cross examination searching deeply into the motivation of this man. Of course as it is almost always the case when cross examination directed to its main objective — destruction of credibility — is unduly restricted, the record, of necessity, does not, cannot, reflect what would have been developed. But in the light of Mulvey's record, the restrictive examination into his criminal past, and at least two other incidents which we shall briefly discuss, it was essential in the truth finding function of the trial that Mulvey's motivations be explored fully and with vigor.

Two other incidents bear on this, one directly, the other at least as a matter of setting each of which was the subject of a restrictive evidentiary ruling and a proper objection by counsel although not asserted separately as error before us.

As a part of the incident described above on inquiry into Mulvey's prior felony convictions, counsel undertook to cross examine him about the conviction for fraud against the FHA in that very courtroom in 1960. The Government objected. Counsel explained that he wished to establish that this conviction was against another bank in the St. Petersburg, Florida area. The close relationship of this so-called prior conviction and the

case on trial was soon established. Nevertheless, the Court in response to the Government's objection that it was "highly irrelevant and immaterial" ruled that "the nature of the case involved has nothing to do with" the one on trial.

That was, of course, on the face of things a correct ruling as a matter of legal principle. The details of the prior crime are not to be gone into. (See note 8, *supra*) But this was not the situation. This record affirmatively reflects the close connection between the prior case, Mulvey's participation in it, the case on trial, and possible motives for Mulvey's testimony against Beaudine in it. On being indicted on May 10, 1963, along with Beaudine — presumably because he had declined to testify against Beaudine in the earlier case — Mulvey filed a plea of double jeopardy. The hearing revealed that in the prior case involving apparently similar Home Improvement Loan activities with the Florida National Bank of St. Petersburg (Docket No. 7821-T-Cr.), Judge Young at the time of sentencing on June 27, 1961, was fully informed that Mulvey had cooperated fully with the Government representatives in the investigation of the case involving Beaudine and Clearwater as to which no indictments had yet been returned but were apparently imminent. By extensive colloquy between Court and counsel, both Government and defense, Mulvey's assistance in the yet unindicted Clearwater case was brought sharply to Judge Young's attention. Indeed, there was complete agreemeent between Government and defense counsel that the Judge was to take this into account in sentencing him as to the Florida National Bank cases. As a result of the plea of double jeopardy, Judge Young again considered the June 27, 1961, sentencing proceeding and concluded that since Mulvey's sentence affirmatively took into account both his activities in the Clearwater case and the assistance he had given the Govervent in its investigation, he had in effect been punished for those acts and the plea of double jeopardy was sustained.

If—and there is no longer any if—the trial Court concluded that the cases were so closely intertwined as to raise the bar of double jeopardy, this was no longer merely the situation of inquiring into the details or nature of a prior felony conviction. The record before the trial Court, but only sketchily before the jury, revealed several things about Mulvey. In 1961, pleading that he had turned state's evidence to help make a case against his accomplice Beaudine, he asked for and presumably received some consideration in the sentence. Next, when he was indicted following his refusal to testify against Beaudine in 1963, he sought the payment of $500 for his attorney's fees and, with or without some connection, declined to give a statement to Beaudine's counsel. Here were interacting factors bearing upon Mulvey's motivation. Was he testifying out of response to some 1961 expectation of leniency from plea of guilty and collaboration? Was he trying to "sell" his testimony for the $500 ostensibly to be paid to reimburse him for counsel fees? Was he testifying against Beaudine because either loyalty to Beaudine or self-incrimination fears led him to decline to testify in 1963 which, in turn, resulted in him being indicted again?

The upshot of it was that Mulvey was fair game for pressing vigorous cross examination in which all of these relevant factors would be subject to penetrating scrutiny. And yet this record reveals that at the instance of the Government this sort of inquiry was nipped in the bud. Neither of the two incidents expressly complained of here would alone justify reversal. But considered together and especially in the light of the other facts revealed we are led to two conclusions. The first is that as the key witness upon which the Government's whole case rested, both legally and persuasively, Mulvey was not exposed to the truth-revealing pressures of the sort of cross examination which is really the heart of our adversary system.[12] Second, this having occurred,

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[12] Montgomery v. United States, 5 Cir., 1953, 203 F.2d 887, 890-91; District of Columbia v. Clawans, 1937, 300 U.S. 617, 630-32, . . . S.Ct. . . . , 81 L.Ed. 843; Alford v. United States, 1931, 282 U.S.

we have no way of ruling out the likely harmful consequences. On a matter so important as Mulvey's trustworthiness and credibility, if we are left in doubt we cannot allow the conviction to stand. *Kotteakos v. United States,* 1946, 328 U.S. 750, 765, ____ S.Ct. ____, 90 L.Ed. 1557.

Another incident, although not so direct, bears on this general problem of harmfulness. The Government offered in evidence the papers concerning approximately 24 home loan transactions in which Mulvey claimed he and Beaudine had an interest. We quickly agree with the Government that, contrary to Beaudine's attack, this was perfectly proper. With a conspiracy count, the Government was not limited to either the loan transactions which formed the basis of the substantive counts or comprised the overt acts in the conspiracy count. These were properly admissible to prove the general arrangement and relationship between Mulvey and Beaudine, Beaudine's practice on behalf of Clearwater and for himself and the manner in which loans were processed. The obvious purpose was to show Beaudine's close connection, the indispensability of his approval of each of them, and the fact that he did approve these knowing that he would share in the booty. However, through an officer of Clearwater, counsel for Beaudine had approximately 90 other files identified in which Beaudine had rejected the loan applications. Subsequently counsel undertook in cross examining Mulvey to prove from Clearwater's records that 90 some applications had been "rejected." Mulvey stated that he could "tell why they were rejected" but again as a result of Government objections, the Court "sustained the objection" and admonished counsel to "go ahead with something that we can get on here" and to "Let's put an end to this 'rejected' business * * * let's not waste any more time."

687, . . . S.Ct. . . . , 75 L.Ed. 624; United States v. Augustine, 3 Cir., 1951, 189 F.2d 587, 590-91; United States v. Fontana, 3 Cir., 1956, 231 F.2d 807, 810-12.

In many respects this was, or at least might have been, the very heart of the case. Probably the big issue was the presence or absence of the intention to defraud. The defense theory was that Beaudine took extraordinary care for the interests of Clearwater, established procedures in excess of those demanded by federal regulations, and so successful was he that the bank never, so far as this record reveals, suffered a dime's loss. Since this issue "of intent to defraud" was inescapably for the jury even under the broad and liberal standard which we have laid down, anything which bore upon the purpose, motivation and intention of Beaudine was certainly relevant. It is no answer to suggest, as the inarticulate objection of the Government seemed to imply, that this would be trying each of the 92 "rejections." It was no more doing that than was the Government's affirmative offer of the 24 loan files a "trial" of each of them. This bore directly upon the procedure established by Clearwater, largely through Beaudine, the performance of his own official duties and whether, on the standard we have elaborated, this was done with a deceitful purpose to bring about a loss or obtain an advantage.

We think this illustrates again that the real difficulty in the trial of this case was the Government's insistence that the case could be truncated as the Government saw fit into those transactions which it thought were pertinent. But both affirmatively and defensively, the case was not confined to the three isolated loans forming the subject of the substantive counts or the few items described as overt acts in the conspiracy count. Broad range was rightfully allowed to the Government in establishing the general scheme, pattern, procedure, motivation and practice out of which to establish the requisite intent to defraud and participation in profits. Equally so, broad range was to be afforded in the rebuttal of these offtimes elusive factors.[13]

[13] There were two mechanical problems which seemed to vex the trial of this case. The first was apparently an absence of any pretrial procedure, see Judicial Conference of the United States,

Considered cumulatively, these restrictive rulings leave us with the impression that the jury did not see the whole case. Accordingly, the case must be retried.

REVERSED AND REMANDED.

Recommended Procedures for the Trial of Protracted Cases 47 (West 1960) and especially page 48 n. 55, now covered specifically by F.R.Crim.P. 17.1 (added February 28, 1966, effective July 1, 1966), by which the mass of documentary evidence was organized, marked, identified, etc. in advance of trial. Throughout counsel for defense stipulated to authenticity, genuineness of initials and signatures, but as this came during the trial each paper had to be separately handled, sometimes three and four times in laboriously undertaking to see whether it had, for example, a signature or initial on it, or the like. The next, and to us more serious, is the procedure, apparently a time-honored one among Florida lawyers and Judges, by which documents can be identified only on cross examination reserving to the cross examiner's own "case" the opportunity to reveal either the contents of the identified paper or offer it in evidence. Considering the valuable right of a defendant to stand on the motion for judgment of acquittal, F.R.Crim.P. 29; Jackson v. United States, 5 Cir., 1958, 250 F.2d 897, 901, and the hazard that comes to one who undertakes to put on a case after the motion is denied, it is difficult to see how evidence (documentary or oral) which is relevant is to be kept from the jury's consideration until the Government's case is all over and the defendant is forced to put on a case. Where in a civil case a similar action prejudiced substantive rights, we disapproved such practice. Delta Engineering Co. v. Scott, 5 Cir., 1963, 322 F.2d 11 at 19, on rehearing, 325 F.2d 432. As this sometimes directly involves, or is akin to, the much mooted problem of the Federal versus the Orthodox rule on the scope of cross-examination, see Wigmore, Evidence §§1885-88, 1890 (3d ed. 1940), we would emphasize that our criticism assumes that the matter sought to be inquired into (by documents or orally) is related to the matters elicited on direct examination in chief (see, e.g., Wigmore, supra, §1891(2)) or, if not, that it is a matter going to credibility (*Ibid.*). Florida certainly accords much liberality in this direction. See Padgett v. State, Fla., 1912, 64 Fla. 389, 59 So. 946; Frost v. State, Fla.App., 1958, 104 So.2d 77.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1581

RAYMOND ALFRED BEAUDINE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was convicted on one count of federal credit fraud (18 U.S.C. 1006) after a jury trial in the Middle District of Florida and sentenced to five years' imprisonment. The conviction was affirmed, 414 F. 2d 397 (Pet. App. A5-A16), and certiorari was denied, 397 U.S. 987.

Petitioner thereafter filed the present motion to vacate under 28 U.S.C. 2255, claiming denial of speedy trial and conviction of an offense not charged

in the indictment. The motion was denied without an evidentiary hearing[1] or opinion by the district court (Pet. App. A1). The court of appeals affirmed *per curiam* without opinion (Pet. App. A2-A4).

The chronology of events leading up to petitioner's present conviction is as follows:

November 17, 1961—First indictment filed.

August 10, 1962—Case removed from docket and reset for trial at later date.

April 30, 1963—First indictment dismissed because of superseding indictment returned April 24, 1963.

May 4, 1965—Petitioner's motion for continuance denied.

May 6, 1965—Petitioner convicted.

November 17, 1966—Conviction reversed.

February 21, 1967—Second trial ended in mistrial.

March 13, 1967—Petitioner's motion for continuance, filed March 9, 1967, denied.

March 28, 1967—Petitioner's motion to dismiss indictment, on grounds of exhaustion of physical and financial resources, harrassment and violation of due process by six-year delay from first indictment, denied.

May 2, 1967—Petitioner's motion for continuance, filed May 1, 1967, granted.

June 8, 1967—Petitioner convicted.

1. Petitioner's primary contention is that his motion to vacate on grounds of denial of the right to a speedy trial should not have been dismissed without an evidentiary hearing. A hearing was not required,

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[1] Petitioner was, however, twice heard in argument.

however, since "the files and records of the case conclusively show[ed]" that petitioner was "entitled to no relief." 28 U.S.C. 2255. Although the district judge filed no opinion, his stated reason for denying the motion without an evidentiary hearing was that petitioner had already been afforded one hearing on this issue (on March 28, 1967), and the record showed that he was entitled to no relief (Pet. 9). In these circumstances, the district judge was not required to afford petitioner a second hearing, particularly since the delay following the first hearing was occasioned by petitioner's request for a continuance. *Kaufman* v. *United States*, 394 U.S. 217, 227, n 8.

Moreover, the docket discloses that petitioner at no time demanded a speedy trial, although he was free on bail and represented by retained counsel. On the contrary, on three different occasions he moved for continuances. In these circumstances, petitioner's right to a speedy trial was not denied. See, *e.g.*, *United States* v. *Persico*, 425 F. 2d 1375, 1384-1385 (C.A. 2), certiorari denied, 400 U.S. 869; *Bandy* v. *United States*, 408 F. 2d 518, 522 (C.A. 8). Compare *Dickey* v. *Florida*, 398 U.S. 30, 32-33.

2. Petitioner also contends that since the indictment charged that he acted with "intent to injure and defraud," he was improperly convicted because no intent to injure was shown. However, intent to injure is not an element of the offense under 18 U.S.C. 1006, and these words were therefore properly ignored as surplusage. *Ford* v. *United States*, 273 U.S. 593, 602; *Gawne* v. *United States*, 409 F. 2d

1399, 1403 (C.A. 9), certiorari denied, 397 U.S. 943; *United States* v. *Harvey*, 428 F. 2d 782 (C.A. 9).[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JUNE 1971.

[2] The court of appeals, in its opinion on direct appeal, pointed out that the intent issue had been fully discussed and clarified by the court in reversing petitioner's first conviction. No further, unresolved questions regarding intent are presented by petitioner's Section 2255 motion. 414 F. 2d 397, 399 (Pet. App. A-8).

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